

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.219 of 2004

Reserved on : July 20, 2007

Date of decision : 9.8.2007

Kamaal Chand	...Appellant.
Versus	
N.C.B., Chandigarh	...Respondent.

Coram

The Hon’ble Mr. Justice Surjit Singh, Judge.

The Hon’ble Mr. Justice Kuldeep Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. N.S. Chandel, Advocate.

For the Respondent : Mr. Ashwani Pathak, Central Government Counsel.

Surjit Singh, Judge

Appellant is aggrieved by the judgment of the trial Court whereby he has been convicted of offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default of payment of fine to undergo rigorous imprisonment for a further period of two years.

2. Factual matrix of the prosecution case is like this. On 29th January, 2002, a team of Narcotic Control Bureau, Chandigarh, headed by PW-1 O.P. Sharma, Superintendent, which included among others, PW-2 O.P. Bhatt, Intelligence Officer and PW-3 Hayyat Singh, OTC, reached Theog in Shimla District. PW-2 O.P. Bhatt received secret information that smuggling of narcotic drugs, like *Charas* etc., was rampant in the area of Mahipul. He reduced this information into

Whether reporters of the local papers may be allowed to see the judgment?

...2...

writing, vide Ex. PA, and handed it over to PW-1 O.P. Sharma, the latter being his immediate superior officer. PW-1 O.P. Sharma then requested the Sub Divisional Police Officer, Theog, for providing two policemen to assist in organizing a *Naka* at Mahipul. The said Police Officer made available the services of two police officials, namely PW-4 HC Mohinder Kumar and one Jagat Singh. The party started for Mahipul around 10.30 p.m. *Naka* was laid at Mahipul around 12.30 a.m. on 30th January, 2002. Soon two persons were seen coming from the side of village Balag. They were carrying bags slung on their shoulders. Appellant was carrying a blue coloured bag and the other man, named Jagat Singh, a green coloured bag. On seeing the police, the appellant and his companion Jagat Singh turned about and tried to run away. They were overpowered. They were informed, in writing, that search of their person and bags was intended to be conducted, because it was suspected that they were carrying some contraband and in case they so desired, the intended search could be arranged in the presence of a Magistrate or a Gazetted Officer. Appellant and his companion opted for the search of their persons and bags on the spot by PW-1 O.P. Sharma and PW-2 O.P. Bhatt. Thereafter, search of the bag of the appellant was conducted. It was found to contain *Charas*, which weighed 4 kgs. Two samples, each weighing 24 grams, were separated. Samples and the bulk *Charas* were made into three separate parcels. The bag containing *Charas* was also seized and made into another parcel. All the parcels were sealed with the seal of the Narcotic Control Bureau. Thereafter, a notice, under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, was served upon the appellant and he was thereafter questioned as to the source of the recovered *Charas* and where he was carrying it. He made statement

...3...

that he had procured the *Charas* from Paras Ram, a shopkeeper of Village Giankot, and was carrying it to Sanjauli where it was to be delivered to someone.

3. Sample of the stuff recovered from the appellant was got tested from Chemical Examiner, Department of Revenue, Ministry of Finance, Central Revenue Control Laboratory, New Delhi. The said Examiner reported, per report Ex. PT, that the sample was of *Charas*.

4. During the course of trial, prosecution examined four witnesses. They are PW-1 O.P. Sharma, Superintendent of Narcotic Control Bureau, PW-2 O.P. Bhatt, Intelligence Officer of the same Bureau, PW-3 Hayyat Singh, OTC, employed with the Bureau, and PW-4 HC Mohinder Kumar, who was deputed by Theog Police to assist the above named Narcotic Control Bureau Officers in organizing a *Naka* alongwith another police official named Jagat Singh.

5. Appellant took the plea that as a matter of fact he had been picked up by the police from the shop of Paras Ram at village Giankot around 8 p.m. on 29th January, 2002, alongwith the other man named Jagat Singh and one Narinder and that some *Charas* was recovered from the shop of Paras Ram, which was divided into two parts and one part was planted upon him while the other upon Jagat Singh.

6. Trial Court did not believe the defence plea. Relying upon the testimony of PW-1 O.P. Sharma, PW-2 O.P. Bhatt, PW-3 Hayyat Singh and PW-4 HC Mohinder Kumar, the trial Court convicted and sentenced the appellant, as aforesaid.

7. Learned counsel for the appellant argued that as per report Ex. PT, the sample stuff contained only 2.5 per cent THC, whereas the *Charas* should contain minimum 8 per cent of THC. In

...4...

support of his contention, he referred to a couple of treatises. The argument cannot be accepted for the simple reason that the Courts are supposed to go by the definition of "*Charas*" as given in the Narcotic Drugs and Psychotropic Substances Act. As per definition given in Section 2(iii)(a), *Charas* is separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish. The Chemical Examiner, vide report Ex. PT, has given definite opinion that the sample stuff was *Charas*. The appellant did not question the report during the course of trial by summoning the Chemical Examiner or by leading some other evidence, indicating that the stuff was not *Charas*. Therefore, we are of the considered view that in view of report Ex. PT, which remains unchallenged, the appellant cannot be heard to plead that the recovered stuff was not *Charas*.

8. Next it was submitted that there were major contradictions and discrepancies in the prosecution evidence, which rendered its version highly doubtful. Our attention was drawn to the alleged contradictions in the testimony of the witnesses examined by the prosecution. It was pointed out that while PW-1 O.P. Sharma testified that statement, under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, Ex. PN, of the appellant was recorded before the search, PW-2 O.P. Bhatt stated that the said statement was recorded after the recovery had been effected. No doubt, the contradiction, as has been pointed out, is there, but the record shows that the statement was recorded only after the search had been conducted and, therefore, there should be no reason to disbelieve the testimony of PW-2 O.P. Bhatt. PW-1 O.P. Sharma is not signatory to

...5...

the statement Ex. PN or the notice under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, which was issued to the appellant before the recording of the aforesaid statement. It appears that either PW-1 O.P. Sharma did not remember the time when the statement Ex. PN was recorded or he was attending to some other work when the statement Ex. PN was recorded by PW-2 O.P. Bhatt. The text of statement Ex. PN shows that it was recorded only after *Charas* had been recovered from the appellant.

9. Learned counsel for the appellant referring to this very contradiction and the date below the signature of PW-1 O.P. Sharma on search and seizure memo Ex. PH further argued that it appeared that PW-1 O.P. Sharma was not even present on the spot or anywhere near the spot. He pointed out that even though the search and recovery are alleged to have been effected on 30th January, 2002 and the date below the signature of PW-2 O.P. Bhatt and other witnesses on the search and seizure memo Ex. PH is 30th January, 2002, the date below the signature of PW-1 O.P. Sharma on all the pages of the search and seizure memo is 31st January, 2002. No doubt, the date below the signature of PW-1 O.P. Sharma on Ex. PH, rather on every page of it, is 31st January, 2002, whereas, the date below the signature of PW-2 O.P. Bhatt and other persons by whom too the memo is signed is 30th January, 2002, but from this fact or the aforesaid contradiction in the testimony of PW-1 O.P. Sharma and PW-2 O.P. Bhatt, it cannot be assumed that PW-1 O.P. Sharma was not present on the spot. As a matter of fact from the suggestions, which were put to PW-1 O.P. Sharma in the cross-examination, it is clear that he was there in the area, where recovery was effected, on the night intervening 29th and 30th January. It was suggested to the witness that he and

...6...

other members of the Narcotic Control Bureau party had raided the shop and the house of one Paras Ram in village Giankot on the aforesaid night and found the *Charas*, in question, at his shop.

10. Another contradiction pointed out by the learned counsel for the appellant pertains to the time when the search party returned to Theog after effecting the recovery from the appellant and his companion Jagat Singh, as also the time when the proceedings concluded on the spot. PW-1 O.P. Sharma stated that the party returned to Theog around 2.30 p.m. after concluding the proceedings on the spot around 2 p.m. PW-2 O.P. Bhatt also made a similar statement. But PW-3 Hayyat Singh and PW-4 Mohinder Kumar stated that the proceedings concluded around 7 or 8 in the morning and the party returned to Theog at about 10 or 11 a.m. Both the sets of the “contradictory” statements appear to be reconcilable. PW-3 Hayyat Singh has stated that in the first instance PW-2 O.P. Bhatt, the appellant and the police officials returned to Theog around 10 or 11, but PW-1 O.P. Sharma remained on the spot and that after dropping the police officials and the appellant and his companion Jagat Singh at Theog the vehicle went back to the spot with PW-2 O.P. Bhatt in it to fetch PW-1 O.P. Sharma and that the vehicle returned to Theog with PW-1 O.P. Sharma around 3 p.m. Moreover, there is statement, under Section 67, of the appellant, Ex. PN, in which he admitted that *Charas* had been recovered from him at Mahipul on the night intervening 29th and 30th January, 2002, by PW-1 O.P. Sharma and PW-2 O.P. Bhatt and that he had purchased the same from Paras Ram, a shopkeeper of Giankot, and was carrying it to Sanjauli to sell it at the rate of Rs.10,000/- per kilogram. Therefore, the “contradiction” becomes meaningless.

11. It was argued that the statement, under Section 67, is hit by Section 24 of the Indian Evidence Act and Article 20(3) of the Constitution of India. The argument is not supported by the material on record. A confession is irrelevant, under Section 24 of the Indian Evidence Act, if it is caused by any inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

12. In the present case, the appellant has nowhere taken the plea that he made statement Ex. PN, on account of any inducement, threat or promise made by PW-1 O.P. Sharma or for that matter from any other person, whether in authority or otherwise. The appellant did not say so even in his statement, under Section 313 of the Code of Criminal Procedure nor was any suggestion put to any witness during the course of their cross-examination that any inducement, threat or promise proceeded from them to extort the confession. Appellant denied, in his statement under Section 313 of the Code of Criminal Procedure, in reply to Question No.31, that he had made statement Ex. PN. But no suggestion was put to PW-1 O.P. Sharma or PW-2 O.P. Bhatt that appellant had not made any such statement in spite of their having categorically stated that the statement was made by the appellant.

13. Article 20(3) of the Constitution of India also does not come to the rescue of the appellant, because according to the said Article no person accused of any offence can be compelled to be a witness against himself. It is not the case of the appellant that he had

...8...

been compelled to make statement Ex. PN. As a matter of fact, as noticed hereinabove, no suggestion was given to the witnesses of the prosecution, namely PW-1 O.P. Sharma and PW-2 O.P. Bhatt, who proved statement Ex. PN that the said statement was the result of any inducement, promise or threat proceeding from them or that the appellant was compelled to make such a statement.

14. It was then argued that the seal with which the samples and the bulk *Charas* had been sealed remained with PW-1 O.P. Sharma and, therefore, the possibility of his having tampered with the samples, which were sent to the Chemical Laboratory, cannot be ruled out. There is nothing on the record suggesting that the samples had been tampered with. No suggestion was put to PW-1 O.P. Sharma, with whom the samples remained till they were sent to the Chemical Laboratory, that he or anybody else had tampered with the samples.

15. No other submission had been made on behalf of the appellant.

16. In view of the above discussion, appeal is dismissed being without merit.

(Surjit Singh), J

August 9, 2007_(sd)

(Kuldip Singh), J